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Idris bin Hairun v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-Q5–42 OF 2004
ZALEHA ZAHARI, KANG HWEE GEE AND AZHAR MA'AH JJCA
1 JULY 2009

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Accused lured to arrest spot by police witness through telephone — Whether record of telephone conversation must be tendered — Whether conversation supported by evidence of sequence of events that took place at scene of crime — Whether need for further corroborative evidence

D

Criminal Procedure — Statements — Admissibility — Drug trafficking — Statement made by owner of car used for drug trafficking — Whether statement admissible — Criminal Procedure Code s 112

E

One Zainal Abidin ('SP6') was arrested in connection with drug trafficking activities. SP6 revealed to the police that he received his supplies of drugs from the appellant. The police then asked SP6 to telephone the appellant to arrange to purchase ganja. SP6 made the telephone call to the appellant and a meeting was arranged for the transaction to be executed at an agreed location and time. The appellant was arrested by the police when he arrived at the agreed location. A small plastic packet of ganja was found in the appellant's trousers pocket and a green bag containing four packages suspected to be ganja were found in the boot of the car driven by the appellant. The appellant was, inter alia, charged with trafficking in 3,819g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant denied any knowledge of the drugs. The car driven by the appellant belonged to his daughter, one Siti Mariam. Since Siti Mariam was then under maternity confinement, she did not testify in court but the court allowed her statement recorded under s 112 of the Criminal Procedure Code to be admitted. The appellant was convicted and sentenced to death on the first charge and hence this appeal. The appellant claimed that: (i) the prosecution failed to tender the record of the telephone conversation between SP6 and the appellant to prove that there was such a transaction for sale and purchase of the drugs in question; and (ii) that the trial judge erred in law in admitting the s 112 statement as it caused unfairness and prejudice to the appellant.

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Held, dismissing the appeal:

(1) What took place at the scene of the crime was consistent with the evidence of SP6 with regard to the subject matter of the telephone conversation with the appellant. The conversation was well supported by the evidence of the sequence of events that took place at the scene of crime. There was no need for any further corroborative evidence of any recording of any conversation between SP6 and the appellant nor was there any need to produce the telephone bills of SP6 or the appellant as corroborative evidence (see paras 16–17).

(2) Siti Mariam's statement was of not much significance to the case as the statement was not the foundation of the prosecution's case. There were other incriminating evidence that pointed to the appellant having committed the offence (see para 20).

[Bahasa Malaysia summary

Zainal Abidin ('SP6') ditangkap berhubung dengan aktiviti-aktiviti pengedaran dadah. SP6 mendedahkan kepada polis bahawa dia menerima bekalan dadahnya daripada perayu. Polis kemudiannya meminta SP6 menelefon perayu untuk mengaturkan pembelian ganja. SP6 membuat panggilan telefon kepada perayu dan satu perjumpaan diaturkan di lokasi dan masa yang dipersetujui untuk transaksi tersebut. Perayu ditangkap oleh polis apabila dia tiba di lokasi yang dipersetujui. Satu plastik kecil ditemui dalam poket seluar perayu dan sebuah beg mengandungi empat bungkusan yang disyaki ganja ditemui dalam but kereta yang dipandu perayu. Perayu, dituduh mengedar 3.819g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu menafikan mempunyai pengetahuan mengenai dadah tersebut. Kereta yang dipandu perayu merupakan kepunyaan anak perempuannya, Siti Mariam. Memandangkan Siti Mariam berada di dalam pantang, dia tidak boleh memberi keterangan di mahkamah tetapi mahkamah membenarkan pernyataannya yang direkodkan di bawah s 112 Kanun Prosedur Jenayah diterima. Perayu disabitkan dan dijatuhi hukuman mati atas tuduhan pertama dan oleh itu rayuan ini dibuat. Perayu mendakwa bahawa: (i) pihak pendakwaan gagal untuk menender rekod perbualan telefon di antara SP6 dan perayu untuk membuktikan terdapat transaksi jualan dan belian dadah tersebut; dan (ii) bahawa hakim perbicaraan khilaf dalam undang-undang apabila menerima pernyataan s 112 memandangkan ia menyebabkan ketidakadilan dan prejudis kepada perayu.

Diputuskan, menolak rayuan:

(1) Apa yang berlaku di tempat kejadian jenayah konsisten dengan keterangan SP6 berkenaan dengan perkara subjek perbualan telefon

A dengan perayu. Perbualan tersebut disokong oleh keterangan turutan kejadian di tempat kejadian jenayah. Keterangan sokongan mengenai rekod perbualan di antara SP6 dan perayu dan bil telefon SP6 atau perayu tidak diperlukan (lihat perenggan 16–17).

B (2) Pernyataan Siti Mariam tidak membantu kes ini memandangkan pernyataan tersebut bukannya asas kes pihak pendakwaan. Terdapat keterangan kebersalahan lain yang menunjukkan bahawa perayu melakukan kesalahan tersebut (lihat perenggan 20).]

C **Notes**

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

For cases on admissibility, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4343–4364.

D **Legislation referred to**

Criminal Procedure Code s 112
Evidence Act 1950 s 32(1)(i)

E **Appeal from:** Criminal Trial No 45–28 of 1999 (High Court, Pulau Pinang)

Md Zahar bin Ngah (Zahar & Partners) for the appellant.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

F **Azhar Ma'ah JCA:**

[1] At the High Court below, the appellant was charged as follows:

G (a) Bahawa kamu pada 20 Jun 1998 jam lebih kurang 8.20 malam di lorong belakang Desa University Commercial Complex, Jalan Sungai Dua, dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya iaitu cannabis seberat 3,819 H gram, dan oleh itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

(b) Bahawa kamu pada 20 Jun 1998 jam lebih kurang 8.20 malam di lorong belakang Desa University Commercial Complex, Jalan Sungai I Dua, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah memiliki dadah berbahaya iaitu cannabis seberat 2.90 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah seksyen yang sama.

[2] On the first charge, the learned trial judge found the appellant guilty as charged and convicted him and accordingly sentenced him to death. Against this order the accused now appeals and upon hearing counsel for both parties we unanimously dismissed the appeal. We now give our reasons.

[3] The facts show that on 19 June 1998, DSP Yusof bin Mat Taib ('SP5') from Jabatan Narkotik, Ibu Pejabat Kontinjen Perak, upon information received, arrested one Zainal Abidin bin Shafie ('SP6') in connection with Bagan Serai Report concerning drug trafficking activities. Following an investigation on SP6, it was revealed that SP6 received his supplies of drugs from one Idris bin Hairun, the appellant in this appeal. Being furnished with this information, SP5 took the initial step on the investigation of the present case by asking SP6 to telephone the appellant to arrange for a purchase of 4kg of ganja by SP6 from the appellant. A telephone call was made by SP6 to the appellant and the appellant agreed to supply 4kg of ganja at the price of RM1,000 per kg and a meeting was arranged for the transaction to be executed. It was agreed that the delivery was to take place at Lorong Belakang Desa University Commercial Complex at 8pm. Following this arrangement made between SP6 and the appellant the police immediately swung into action.

[4] At about 6pm, SP5 and a party of 13 police officers proceeded to Penang in four cars and a lorry driven by SP6. Upon arrival at the arranged location at about 7.30pm, SP6 was instructed to park his lorry in front of a tyre shop whilst the others positioned themselves at various other locations. Soon they noticed a motorcar No PBJ 9770 driven by a male Malay entering the area where they had been waiting. It stopped behind the Commercial Complex and the driver alighted from the said car. Immediately this person was apprehended and arrested by SP5 who had earlier positioned himself in the vicinity. Everyone then rushed up to assist SP5. SP5 then examined the body of the person arrested and found one small plastic packet of ganja in his trousers pocket. This was the subject matter of the second charge. SP5 then opened the booth of the car using the ignition key. Inside the booth they saw a green bag. Upon opening the bag they found four packages which they suspected to be ganja. Then they took the man, the car and the confiscated drugs back to the police station. SP5 and other witnesses identified the appellant as the person arrested. At the police station, the exhibits were handed over to the investigating officer, Chief Inspector Rajaram a/l Arumugam ('SP15'). In his evidence, SP15 among other things informed the court that on the night in question SP5 handed over to him 13 items that were said to have been seized from the appellant following his arrest at the scene of the crime. Among them were:

A (a) satu paket plastik disyaki mengandungi ganja tanda YA ('P10A');

(b) satu beg hijau Panther tanda YB ('P12');

(c) empat ketulan mampat disyaki ganja tanda YB1-YB4 pada balut plastic wrapper ('P11 G1-G4');

B (d) kereta Proton Saga PBJ 9770 ('P14A'); and

(e) satu Ericsson handphone ('P17').

[5] Exhibits P10, P11 and P12 were subsequently sent to the chemist for C analysis. The chemist, SP3 in her evidence confirmed that the '*empat ketulan mampat disyaki ganja tanda YB1–YB4 pada balut plastic wrapper* (P11 G1-G4)' to be cannabis with net weight of 3,819g.

[6] With regard to the car No PBJ 9770, the investigating officer further D informed the court that a search made at the office of Jabatan Pengangkutan Jalan revealed that the said vehicle was registered in the name of one Siti Mariam bt Idris who was the daughter of the appellant. Attempts were made to bring Siti Mariam to testify on this matter. The process server did serve a subpoena on her and came back with the following note and endorsement on E the subpoena.

> Telah pergi ke alamat tersebut dan berjumpa Siti Mariam pada 5.5.04. Beliau ada pemeriksaan di Klinik Sungai Dua dan akan datang pada 6.5.04. Beliau mengandung hampir 9 bulan.
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> F Sgd.
>
> Ku Mohd. Roshidi bin Ku Marzuki
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> UKpl/124141.

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[7] Siti Mariam turned up in court on 6 May, but she was not called to testify. The learned DPP requested for another date for the evidence of this lady to be recorded as she was then under maternity confinement. The court somehow refused to grant adjournment. Under the circumstances, the H prosecution applied for the statement of the witness be tendered in court on the account of delay under the provision of s 32(1)(i) of the Evidence Act. This, the court allowed. Siti Mariam's statement that was recorded under s 112 of the Criminal Procedure Code was admitted and marked as exh P30. With that last piece of evidence the prosecution closed its case and offered I eleven witnesses to the defence. The defence declined all of them.

[8] Faced with the evidence from the prosecution adumbrated as above, the learned High Court judge was satisfied that a prima facie case had been established and thereupon called the defence. The appellant had chosen to

read a statement from the dock. His evidence was that he was arrested as soon as he alighted from the car. He went to that place to buy goods. He was not told why he was arrested. He was not taken to the rear of the car when the police examined the booth of the car. He was also not shown the offending items allegedly taken from the car. Even when he was taken to the police station, he was not shown the offending drugs. He was merely given a document to sign which he did. He had never trafficked in or did sell ganja. On the day in question, he was not transporting ganja nor was he in possession of the green bag in which the drugs were found. He had nothing to do with the drugs identified in court. He did not know whose bag it was and he didn't know who had left the bag in the booth of his daughter's car.

[9] The car was also used by others staying in the house including his son-in-law married to another daughter. This particular key was always left on the table whilst the other key was in possession of Siti Mariam.

[10] On the day of his arrest, he did not know how the said bag came to be inside the booth of the car. He did not examine the booth of the car when he used it that day. According to him, even SP6 had borrowed the said car and had used it since SP6 was his friend. He denied having any telephonic conversation with SP6 on that fateful day. He denied agreeing to meet SP6 with the ganja.

[11] In his appraisal of the above unsworned defence of the appellant, the trial judge had these to say:

> I am of the view that taking all the evidence in its totality, and even though there is no evidence that the accused had dealt with the green bag or its contents, it is safe for this court to find that the accused had knowledge of the 4 kilos of ganja found inside the green bag and which was found inside the booth of the car the accused was driving. This coupled with the fact that SP6 had said he had previously dealt with the accused who was his supplier, and the fact that a small quantity of cannabis was found in his possession to which he had pleaded guilty, all these go to show his previous conduct in dealing with cannabis and his knowledge of what cannabis is.
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> I therefore found the accused guilty as charged convicted him under s 39B(1)(a) of the DDA.

THE APPEAL

[12] Before us learned counsel for the appellant raised two grounds of appeal:

(a) that the prosecution failed to tender the record of the telephone

A conversation between the agent provocateur ('SP6') and the appellant to prove that there was such a transaction for sale and purchase of the drugs in question; and

(b) that the trial judge erred in law in admitting the s 112 statement of the B appellant's daughter under s 32(1)(i) of the Evidence Act as it would caused unfairness and prejudice to the appellant.

[13] It was also submitted that the trial judge had erred in giving too much weight on the statement.

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[14] We shall now consider the grounds of appeal.

[15] Re ground (1) — the drugs transaction was triggered when SP6 the D agent provocateur, upon instruction of SP5 telephoned the appellant informing the appellant of his intention to purchase 4kg of ganja. After making the call, SP6 informed SP5 that the appellant agreed to meet him at the appointed place with the requested quantity of drugs ie 4kg. According to SP6, their arrangement was for the delivery to take place at the back of E 7–Eleven at about 8pm. With the arrangement made between SP6 and the appellant the ambush party led by SP5 raced to the scene. Sure enough, upon arrival from their respective position they saw the appellant in his car approaching and stopping at the appointed place. This was at about the appointed time ie around 8pm. The appellant alighted from his car and was F immediately nabbed by the raiding party. Upon inspection on the car, the police recovered four slabs of compacted materials from inside a green bag that were later analysed and confirmed to be cannabis with a total net weight of 3,819g.

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[16] From the above episode, it can be clearly seen that what took place at the scene of the crime was consistent with the evidence of SP6 with regard to the subject matter of the telephone conversation that he had with the appellant prior to that.

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[17] It is a consistent testimony that there was a prior arrangement between SP6 and the appellant for the delivery of the offending drugs and it had crystallised. In the circumstances, we are of the opinion that the evidence led by the prosecution in respect of the telephone conversation is well supported I by the evidence of the sequence of events that took place at the scene of crime. There is no need therefore for any further corroborative evidence of any recording of any coversation between SP6 and the appellant nor is there any need to produce the telephone bills of SP6 or the appellant as corroborative evidence.

[18] We now come to the second ground. A

[19] Perusing the appeal records, we find the following passage from the trial judge's ground of decision.

> Counsel then submitted that Siti Mariam ought to have been called. Counsel initially objected to Siti Mariam's statement being admitted into evidence under s 32 of the Evidence Act. Having been served a copy of the statement and finding at that stage that the said statement was in his favour, he agreed to its admission although counsel qualified the admission by reserving his right to submit on the weight to be given to such evidence. To my mind counsel cannot blow hot and cold. I agree that inadmissible evidence, even though not objected to by parties, cannot be admissible. But the statement of Siti Mariam is not inadmissible under s 32 but subject to certain qualifications. When such qualifications are waived by counsel it does not behove to protest subsequently. In any case I have already found based on counsel's submission that the accused indeed was given one ignition key and although he said that he left it on the table, Siti Mariam's statement showed that she gave that key to the accused. Whereas the other key which she had was for her use and for her family.

B C D

[20] With respect of the above passage, we are in agreement with the trial judge and would like to add that the impugned statement is of not much significance to the case as we are of the view that the statement is not the foundation of the prosecution's case. There are other incriminating evidence that points to the appellant having committed the offence. There is more than sufficient credible evidence of the appellant's involvement in the negotiation and agreement to sell to SP6 the 4kg of cannabis subsequently brought to the appointed place in the car belonging to his daughter, Siti Mariam. E F

[21] Based on the above reasons, we dismissed the appellant's appeal and affirmed the conviction and sentence. G

Appeal dismissed.

Reported by Kanesh Sundrum H

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